

No. 85-2079

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Supreme Court, U.S.  
**E I L E D**

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CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,  
*Petitioners*,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent*.

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

**BRIEF OF PETITIONERS**

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## **QUESTION PRESENTED**

Whether a federal district court has jurisdiction under Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement as long as the employer has a duty under applicable labor-management relations law to make such contributions.

### **LIST OF PARTIES**

The parties to the proceedings below and before this Court are:

1. Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, and Laborers Training and Retraining Trust Fund for Northern California;
2. Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Vacation Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, and Cement Masons Apprenticeship and Training Trust Fund for Northern California; and
3. Advanced Lightweight Concrete Co., Inc.

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**On Writ of Certiorari to the United States  
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**BRIEF OF PETITIONERS**

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A) is reported at 779 F.2d 497. That Court's order denying Petitioners' petition for rehearing and rejecting Petitioners' suggestion for rehearing *en banc* (Pet. App. C) was filed on March 18, 1986. The order of the United States District Court for the Northern District of California (Pet. App. B) was filed on July 30, 1984, and entered on July 31, 1984, and is not reported.<sup>1</sup>

**JURISDICTION**

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 26, 1985. A timely petition for rehearing and sug-

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<sup>1</sup> Appendices A, B and C are attached to the petition for a writ of certiorari.

gestion for rehearing *en banc* was filed on January 9, 1986. On March 18, 1986, the petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected. The petition for a writ of certiorari was filed on June 16, 1986, and was granted on February 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **STATUTES INVOLVED**

The relevant statutory provisions are:

- A. National Labor Relations Act, as amended, Sections 7 and 8, 29 U.S.C. §§ 157 and 158.
- B. Labor Management Relations Act of 1947, as amended, Sections 301, 302 and 303, 29 U.S.C. §§ 185, 186 and 187.
- C. Employee Retirement Income Security Act of 1974, as amended, Sections 502, 515, 4201, 4203, 4212, 4221 and 4301, 29 U.S.C. §§ 1132, 1145, 1381, 1383, 1392, 1401 and 1451.
- D. Multiemployer Pension Plan Amendments Act of 1980, Sections 3, 306 and 104(2), 29 U.S.C. §§ 1001a, 1132(b)(2), 1132(g)(2), 1145 and 1381-1452.

Pertinent portions of these statutory provisions are reproduced at Appendix D to the petition for a writ of certiorari.

### **STATEMENT OF THE CASE**

Petitioners (hereinafter "Trust Funds") are eight multiemployer employee benefit plans established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 186(c)(5). Four of the Trust Funds were created by a collective bargaining agreement and trust agreements between the Northern California District Council of Laborers (hereinafter "Union") and the Associated General Contractors of California, Inc. (hereinafter "AGC"), a multiemployer association representing

construction industry employers, and the remaining four Trust Funds were created by a collective bargaining agreement and trust agreements between the District Council of Plasterers and Cement Masons of Northern California (hereinafter "Union") and the AGC.

Respondent Advanced Lightweight Concrete Co., Inc. (hereinafter "Advanced Lightweight" or "Employer") is a construction industry employer which, prior to 1983, was a member of the AGC and was signatory to the collective bargaining agreements between AGC and the Unions. Those agreements incorporated by reference the terms of the trust agreements and required the signatory employers to contribute a fixed amount per employee-hour worked to the various Trust Funds.

Prior to the expiration of the collective bargaining agreements, Advanced Lightweight withdrew the AGC's authority to bargain on its behalf and offered to bargain with the Unions as an individual employer. On June 15, 1983, upon the expiration of the collective bargaining agreements, Advanced Lightweight ceased contributing to the Trust Funds.

In December 1983, the Trust Funds filed separate suits against Advanced Lightweight, under Section 502 of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA"), 29 U.S.C. § 1132, seeking unpaid contributions from June 15, 1983. The complaints alleged that Advanced Lightweight was obligated to continue to adhere to the terms of its collective bargaining agreements. The complaints further alleged that Advanced Lightweight had violated this obligation by ceasing to make contributions to the Trust Funds immediately upon the expiration of the collective bargaining agreements. These violations, the complaints claimed, constituted violations of Section 515 of ERISA, 29 U.S.C. § 1145, which provides in pertinent part that an employer "who is obligated to make contributions to a multiem-

ployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of such plan or such agreement." Section 515 was added to ERISA by the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208.

Advanced Lightweight moved for summary judgment on two principal grounds: first, that Section 515 of ERISA requires employers to comply with their *contractual* obligations to make contributions to multiemployer plans but does not require employers to comply with their *other* legal obligations to contribute, such as those based on Section 8(a)(5) of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. § 158(a)(5); and, second, that even if Section 515 is not so limited, the Trust Funds' cause of action falls within the exclusive primary jurisdiction of the National Labor Relations Board (hereinafter "NLRB").<sup>2</sup> The District Court granted Advanced Lightweight's motion for summary judgment and the Ninth Circuit affirmed.

On February 23, 1987, this Court granted the petition for a writ of certiorari to enable the Court to review the Ninth Circuit's decision.<sup>3</sup>

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<sup>2</sup> Advanced Lightweight also claimed, in seeking summary judgment, that in fact a bargaining impasse had been reached as of the time it ceased making contributions. The Trust Funds responded to this contention by submitting declarations denying the existence of an impasse. Given the existence of this disputed issue of fact, summary judgment could not have been granted on this basis, and the Ninth Circuit's opinion affirming the District Court's one-sentence order granting summary judgment treats this case as raising only the legal issues stated in the text.

<sup>3</sup> The First, Third and Fifth Circuits have all reached the same result in similar cases. *New Bedford Fishermen's Welfare Fund v. Baltic Enterprises, Inc.*, 813 F.2d 503 (1st Cir. 1987); *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d

## SUMMARY OF ARGUMENT

ERISA is a "comprehensive and reticulated" statute designed to protect employee benefits and provide for the financial stability of private employee benefit plans, including multiemployer plans. *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). ERISA imposes various obligations on employers to pay contributions that they had agreed to pay and on fiduciaries who assumed responsibility for paying the benefits and administering the plans. The declared policy of ERISA is to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts" in order to enforce the duties created by ERISA. ERISA § 2(b), 29 U.S.C. § 1001(b). In 1980, and for several years prior thereto, Congress was concerned with maintaining the financial stability of multiemployer plans, which were in decline due in large measure to the failure of employers to make proper and timely contributions to such plans. See, e.g., MPPAA § 3, 29 U.S.C. § 1001a; *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 581 n.22 (1985).

Prompted by such concern, Congress enacted Section 306(a) of the MPPAA, which added Section 515 to ERISA, 29 U.S.C. § 1145. Section 515 provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

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Cir. 1986), petitions for cert. filed, 55 U.S.L.W. 3127 (U.S. Aug. 11, 1986) (Nos. 86-203 and 86-208); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986), petition for cert. filed, 54 U.S.L.W. 2621 (U.S. Aug. 20, 1986) (No. 86-262).

Additionally, Section 306(b)(2) of the MPPAA added Section 502(g)(2) to ERISA, 29 U.S.C. § 1132(g)(2), in order to provide mandatory awards of interest, attorney's fees, liquidated damages and costs to multiemployer plans which secured judgments enforcing the employers' obligations to make their required contributions.

An examination of the language, history and structure of the MPPAA amendments to ERISA indicates that Congress intended to make NLRA-based contribution obligations independently enforceable in federal court actions under ERISA.

I. A. The language of Section 515 does not, in most cases, pose any interpretative difficulty as most collection actions are brought to enforce an existing collective bargaining agreement. However, situations do exist where the obligation to contribute is not imposed by contract but arises, instead, by operation of law (such as Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5)). The question before this Court is whether or not Section 515 of ERISA imposes a duty on employers to meet these non-contractual legal obligations to contribute. Section 515 is not conclusive as it can be read in opposing ways. One way would limit its application to existing contractual obligations, while the other would extend its application to obligations measured by the terms of the expired contract but otherwise imposed by operation of law. Based on the guidelines established by the Court for choosing among alternative statutory readings, the Trust Funds submit that the latter reading is appropriate as it is *the* reading "which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Commissioner v. Engle*, 464 U.S. 206, 217 (1984).

B. The legislative history of the MPPAA discloses that its purpose was to enhance the financial integrity of

multiemployer plans. See, e.g., *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981); *Pension Benefit Guaranty Corporation v. R. A. Gray & Company*, 467 U.S. 717 (1984). A central theme of the MPPAA amendments to ERISA was to provide strong enforcement tools for multiemployer plans to use in collecting both delinquent contributions and withdrawal liability. Section 515 of ERISA was added in order to "promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies." 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams). The ultimate purpose of Section 515, as noted by its floor managers, was to impose "a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." *Id.*

C. That Congress intended the scope of the Section 515 duty to encompass an employer's obligation to contribute under the NLRA is confirmed by the structure of the MPPAA amendments to ERISA. Both the collection of delinquent contributions and the collection of withdrawal liability were seen by Congress as essential elements in the statutory scheme necessary to protect the financial stability of multiemployer plans. Under the withdrawal liability provisions added by the MPPAA, an employer which "permanently ceases to have an obligation to contribute" under a plan may be liable to the plan for withdrawal liability. ERISA §§ 4201, 4203, 29 U.S.C. §§ 1381, 1383. Section 4212(a) of ERISA, 29 U.S.C. § 1392(a), defines the phrase "obligation to contribute" for purposes of the withdrawal liability sections as an obligation arising "(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law." This definition demonstrates that Congress understood that an employer's obligation to contribute to a plan may be purely contractual ("under one or more

collective bargaining . . . agreements"), but may also be imposed by the NLRA. The language of Section 515 accommodates these two sources of obligation to contribute by including obligations to make contributions "under the terms of a collectively bargained agreement." Another example of the statutory linkage are the MPPAA amendments to ERISA which expressly provide that suits to collect withdrawal liability are to be treated in the same manner as suits to collect delinquent contributions under Section 515. ERISA §§ 4221(d), 4301(b), 29 U.S.C. §§ 1401(d), 1451(b). The effect of these statutory cross-references is to make available the mandatory remedies of Section 502(g)(2) of ERISA. In view of the statutory interconnections, it would be anomalous to read Section 515 as limited to contractual obligations when the obligation to contribute for withdrawal liability purposes plainly includes NLRA-imposed obligations to contribute. Such an interpretation would also disserve the overriding purpose of the MPPAA: to protect the financial integrity of multiemployer plans.

D. If Section 515 were read to apply only to obligations imposed by collective bargaining agreements, the section would be entirely duplicative of Section 301 of the LMRA, 29 U.S.C. § 185, which creates a federal cause of action for the breach of such contracts. The narrow reading, therefore, is foreclosed by the settled rule of statutory construction that a statute not be read in a manner that renders the law meaningless. Thus, Section 515 is best read to impose on employers an ERISA duty to make legally-required, agreed-upon contributions, even if the legal obligation is not itself imposed by contract.

II. A. The NLRA does not preempt Section 515 claims insofar as the claims raise issues under the NLRA or are based on NLRA-created obligations. Whether or not a claim is preempted is a matter of Congressional intent.

*See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). “[W]here there is an independent federal remedy that is consistent with the NLRA,” this Court has generally concluded that “the parties may have a choice of federal remedies.” *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 635 n.17 (1975). *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 179 (1967); *Farmer v. Carpenters*, 430 U.S. 290, 297 n.8 (1977); *Smith v. Evening News Ass’n*, 371 U.S. 195 (1962); *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982).

B. 1. The NLRA enforcement scheme is designed to facilitate the resolution of labor disputes, not the full and prompt collection of delinquent contributions. NLRB proceedings do not provide trustees with adequate means to fulfill their fiduciary duties of assuring the financial integrity of multiemployer plans. The NLRB operates under a number of jurisdictional and procedural limitations in unfair labor practice proceedings which would severely undermine the efforts of trust funds to collect delinquent contributions: the NLRB may decline to exercise its jurisdiction (*see, e.g.*, 29 U.S.C. § 164(c)(1)); the NLRB will not remedy any conduct occurring more than six months prior to the filing of the unfair labor practice charge (*see* 29 U.S.C. § 160(b)); the investigation of charges, and the issuance and prosecution of unfair labor practice complaints are entirely within the control and virtually unreviewable discretion of the General Counsel of the NLRB (*see, e.g.*, 29 U.S.C. § 153(d)); *Vaca v. Sipes*, 336 U.S. 171, 182 (1967); case processing delays and the continuing case backlog at the NLRB will prevent trustees from securing prompt payment of delinquent contributions; the NLRB will not award the reasonable attorneys’ fees, costs, interest on the unpaid contributions and an additional amount equal to the

greater of interest or specified liquidated damages (the so-called mandatory double interest provisions) that would have been awarded by a federal court if a judgment had been entered in the trust funds' favor in an action to enforce Section 515 (*see, e.g.*, 29 U.S.C. § 1132 (g)(2); *David Ashcraft Company, Inc.*, 279 N.L.R.B. No. 94 (1986)); and unilateral settlements in unfair labor practice cases may be entered into by the NLRB and the employer, despite objections by the charging party, which compromise contribution obligations (*see, e.g.*, 29 C.F.R. § 101.9(c)). Yet the trust funds will still remain liable for pension benefits for hours worked by employees for which no contributions were made. *See, e.g.*, *Central Transport*, 472 U.S. at 567 n.7, 579 n.20.

2. Given the emphasis that ERISA places on the trustees' duty to collect delinquent contributions (*see, e.g.*, *id.* at 573, 580), it would be surprising, indeed, if Congress intended to leave trustees at the mercy of the General Counsel of the NLRB in collecting delinquent contributions from employers whose obligation to contribute arises, in part, from the NLRA.

C. 1. Congress expressly provided in the MPPAA that the NLRB is *not* the exclusive forum for determining whether or not an employer has a post-contract expiration obligation under the NLRA to make contributions to a multiemployer pension plan. In withdrawal liability litigation, the federal courts must decide precisely the same issues regarding "impasse" and the date of cessation of the employer's contribution obligation, which the federal courts would be called upon to decide in post-contract expiration contribution collection actions under Section 515. The fact that Congress authorized the courts to adjudicate these NLRA issues in the withdrawal liability context provides persuasive evidence that Congress did not intend the NLRB to be the sole forum for adjudication of collection disputes which raise NLRA issues.

2. Congress expressly withheld from the Secretary of Labor authority to initiate collection actions. *See Central Transport*, 472 U.S. at 578. Congress did so because it concluded that the Department of Labor should not be subjected to pressures to become a collection agency for the recoupment of delinquent contributions. Congress presumably would not have intended the General Counsel of the NLRB to be placed in the same position. Yet, that is precisely the result if trust funds are foreclosed from litigating Section 515 actions which raise NLRA issues.

## **ARGUMENT**

### **Introduction**

ERISA is a "comprehensive and reticulated" statute designed to protect the benefit expectations of participants and beneficiaries of private pension and welfare plans, including multiemployer plans. *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). ERISA imposes a series of obligations on employers who agree to provide fringe benefits to their employees and on fiduciaries who assume responsibility for paying such benefits. And it is the declared policy of ERISA to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts" in order to enforce the duties created by ERISA. ERISA § 2(b), 29 U.S.C. § 1001(b).

In 1980, as part of the MPPAA, Congress added Section 515 to Title I of ERISA, and thus made it a statutory obligation, under ERISA, for an employer "who is obligated to make contributions to a multiemployer plan . . . under the terms of a collectively bargained agreement . . . to . . . make such contributions in accordance with the terms and conditions of such . . . agreement." The necessary effect of that amendment is to create an ERISA cause of action for breaches of such "obligati[ons] to make contributions," since both prior and sub-

sequent to the MPPAA, Section 502 of ERISA, 29 U.S.C. § 1132, has provided a federal cause of action "to redress . . . violations . . . or to enforce any provisions" of Title I of ERISA. *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Indeed, as part of the MPPAA, Congress amended Section 502 to establish specific statutory remedies—including liquidated damages, interest, costs and attorneys' fees—which "the court shall award" in any Section 502 action "to enforce section 515 in which a judgment in favor of the plan is awarded." *See* ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2). This amendment to Section 502 confirms that, as a general matter, a Section 502 action lies to enforce the duty created by Section 515.

In this case, the Trust Funds brought such Section 502 actions, alleging that the Employer had violated Section 515 by ceasing to make contributions. The Complaints rest on the theory that: (i) the Employer had entered into collective bargaining agreements which obligated it to make contributions, on agreed-upon terms, to the Trust Funds; (ii) upon the expiration of those agreements, the Employer remained obligated, by operation of Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), to continue to abide by the terms of the agreements, unless and until the Employer and the Unions reached the point of impasse in bargaining for successor agreements; (iii) the Employer ceased contributing to the Trust Funds prior to that point; and (iv) by failing to make the contributions it was obligated to make, on the terms provided by the expired collective bargaining agreements, the Employer violated its duty under Section 515 of ERISA.

The courts below refused to entertain the Trust Funds' claim on the ground that the contribution obligation the Trust Funds are seeking to enforce is derived from the NLRA. The lower courts' decision poses two distinct, although related questions: first, does the duty imposed

on an employer by Section 515 of ERISA to pay contributions the employer is obligated to make extend to obligations imposed by operation of law; and, second, if so, is a cause of action brought under Section 502 to enforce the Section 515 duty to make NLRA-required contributions preempted by the exclusive primary jurisdiction of the NLRB. We address those two questions *seriatim*.

**I. An Employer Violates Section 515 of ERISA Whenever The Employer Fails To Make A Contribution To A Multiemployer Plan On Agreed-Upon Terms That The Employer Is Legally Obligated To Make.**

A. Section 515 provides in pertinent part as follows:

Every employer who is obligated to make contributions to a multiemployer plan . . . under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of . . . such agreement.

In most cases, this language poses no interpretative difficulty, since most commonly a Section 515 action is brought to secure a contribution required by a collective bargaining agreement, and there is no doubt that an employer who is obligated *by contract* to contribute to a multiemployer plan has a duty under Section 515 to abide by that contractual obligation. However, as the instant case illustrates, cases can arise in which the obligation to make the contributions is defined and measured by the "terms of a collectively bargained agreement," but in which said obligation is not imposed by contract but arises, instead, by operation of law. For example, as in this case, Section 8(a)(5) of the NLRA may require an employer to make agreed-upon contributions which are defined and measured by the terms of an expired collective bargaining agreement.<sup>4</sup> In such situations, the ques-

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<sup>4</sup> See generally *American Distributing Company, Inc. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984) (emphasis added) (under the NLRA, "an employer is required to maintain the status quo and make payments in conformity with

tion arises: does Section 515 impose a duty upon employers to meet these non-contractual legal obligations to contribute.

The language of Section 515 is not conclusive in answering that question, for the section can be read in opposing ways. On the one hand, the operative phrase—"employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement"—can be read to refer only to employers whose obligation to contribute is established by a collective bargaining agreement and the law of contracts. So read, Section 515 would merely create an ERISA duty on employers to comply with their collective bargaining agreements.

Alternatively, the operative Section 515 language can be read to refer to employers whose contributions are *defined and measured by the terms* of a collective bargaining agreement, but whose obligation to contribute exists as a matter of law, independent of the contract. So read, Section 515 would require employers to adhere to all legal duties to make contributions to collectively-bargained plans.

As this Court has recently reminded, where statutory language is susceptible to alternative interpretations, the Court will adopt that reading "which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Commissioner v. Engle*, 464 U.S. 206, 217 (1984). As we proceed to show,

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*the terms of an expired written agreement"); Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970) (emphasis added) ("Since the status quo is quite obviously defined by reference to the substantive terms of the expired contract, it follows that, in a limited and special sense, those pertinent contractual terms 'survive' the expiration date"). Cf. *Walsh v. Schlecht*, 429 U.S. 401, 410-11 (1977) (emphasis added) (requiring "petitioner to make contributions measured by the hours worked by his subcontractor's employees" is not violative of Section 302(c)(5) of LMRA).

that approach compels adoption of the second and broader reading of Section 515.

B. As previously noted, Section 515 was enacted as part of the MPPAA. The purpose of that Act, this Court has explained, was "to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981). "In these amendments, Congress sought to foster 'the maintenance and growth of multiemployer pension plans . . .'" *Id.* (quoting MPPAA § 3(c)(2), 29 U.S.C. § 1001a(c)(2)). See generally *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717 (1984); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. \_\_\_, 89 L.Ed.2d 166 (1986). Congress recognized that the financial instability of multiemployer plans was attributable in substantial part to the failure of employers to make full and timely contributions to such plans. See *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 581 n.22 (1985). See generally *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 86-88 (1982). In enacting the MPPAA, Congress concluded that the existing law was insufficient to deal with the delinquencies of employers in making contributions owed to multiemployer plans.<sup>5</sup>

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<sup>5</sup> At least as early as 1977—three years after the enactment of ERISA—Congress was informed that delinquencies were among “[t]he most significant, and the oldest, day-to-day problem[s] faced by multiemployer plans.” *Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 391 (1977) (testimony of Theodore Groom). In 1978, following these oversight hearings, Senators Williams and Javits, the chairman and ranking minority member of the Senate Human Resources Committee, introduced a bill, The ERISA Improvements Act of 1978, which contained the precursor to Section 515. See S. 3017, § 262, 95th Cong., 2d Sess. (1978).

At the start of the following Congress—the Congress that eventually enacted the MPPAA—Senators Williams and Javits reintro-

The version of the MPPAA initially passed by the House in 1980 attempted to address the problem of delinquent contributions by amending Section 502 to authorize a court to award attorney's fees and liquidated damages (in an amount up to 20% of the delinquency) in actions to recover delinquent contributions. *See H.R. Rep. No. 869 (Part II), 96th Cong., 2d Sess. 48-49, 89 (1980); 126 Cong. Rec. 12233-34 (1980).* The Senate accepted, and strengthened, these remedial provisions—making liquidated damages and attorney's fees mandatory, rather than discretionary, in successful actions for delinquent contributions. *See 126 Cong. Rec. 20172, 20247 (1980).* At the same time, the Senate added Section 515 to ERISA to establish an explicit ERISA duty on employers to comply with their obligations to contribute to multiemployer plans. *Id.*

In adding Section 515 to the bill, the Senate Committee on Labor and Human Resources stated that “[t]he intent

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duced their “ERISA Improvements Act” which, like the prior year’s bill, contained the language ultimately enacted as Section 515. *See S. 209, § 154, 96th Cong., 1st Sess. (1979).* In introducing that bill, Senator Javits explained that this section imposes a “new statutory duty [which] will particularly help multiemployer plans collect delinquent employer contributions.” *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 106 (1979).*

The Williams-Javits bill (S. 209) was approved by the Senate Committee on Labor and Human Resources in 1979; in so doing, the Committee stated that delinquencies were “a problem encountered at one time or another by virtually every multiple employer plan,” that the “importance of timely receipt of previously agreed upon periodic contributions to a collectively bargained multiple employer plan is great,” and that therefore “the collectively bargained obligation of an employer to contribute to such a plan merits special treatment under ERISA.” Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess., S. 209, The ERISA Improvements Act of 1979: Summary and Analysis of Consideration 45 (Comm. Print 1979).

No final action was taken on the Williams-Javits bill (S. 209) by the Senate; it was superseded by the bill that became the MPPAA.

of this section is to promote the prompt payment of contributions." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980) (hereinafter "1980 Comm. Print").<sup>6</sup> The Committee explained the need for the provision as follows:

Delinquencies of employers in making required contributions are a serious problem for most multi-employer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.

These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

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<sup>6</sup> Because the MPPAA bill was jointly referred to the Labor and Human Resources Committee and the Finance Committee, neither Committee was permitted under the Senate's rules to issue a committee report. The "Summary and Analysis of Consideration" quoted in the text was prepared by the committee staff in lieu of a report "in the belief that it will be helpful to the Committee on Finance and others in their consideration of the 'Multiemployer Pension Plan Amendments Act of 1980.'" 1980 Comm. Print iii.

Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. [*Id.* at 43-44.]

On the floor of the Senate, Senator Williams, Chairman of the Senate Committee on Labor and Human Resources and the floor manager of the bill, summarized the effect of Section 515 more briefly, stating: "the bill provides a direct and I suggest unambiguous cause of action under ERISA to a plan against a delinquent employer." 126 Cong. Rec. 20180 (1980).

Following relatively brief debate, the Senate approved the MPPAA bill that had been submitted jointly by the Committees on Finance and on Labor and Human Resources (*id.* at 20247), and that bill was returned to the House for its consideration. Representative Thompson, Chairman of the House Education and Labor Committee, urged the House to accept the Senate's proposed Section 515 and the proposed amendments to Section 502. In agreement with the Senate Labor and Human Resources Committee, Representative Thompson argued that delinquencies were "a serious problem for many multiemployer plans," a problem that was causing "lower benefits and higher contribution rates" for multiemployer plans. 126 Cong. Rec. 23039 (1980). Representative Thompson further contended that "[r]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly." *Id.* And Representative Thompson explained the point of Section 515 quite simply—to "provid[e] a direct, unambiguous ERISA cause of action to a plan against a delinquent employer"—adding:

The public policy of this legislation to foster the preservation of the private multiemployer plan sys-

tem necessitates that provision be made to discourage delinquencies and simplify delinquency collection. *The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans.* A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest on the contributions owed and liquidated damages. *The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.* [Id. (emphasis added).] <sup>7</sup>

Although Congress' attention in enacting Section 515 was directed most immediately at employers who defaulted on promises to make contributions, it makes little sense, given the broad, remedial purposes underlying Section 515, to read Section 515 restrictively so as to require employers only to comply with their contract, but not to comply with their other legal obligations to contribute based on the terms of the contract. Such a reading would mean that some delinquencies constitute violations of Section 515—and thus some delinquent contributions could be collected through Section 515 (and Section 502)—whereas other delinquencies would not violate Section 515 and would not be recoverable under Section 502. This interpretation would, therefore, fail to achieve the most fundamental aim of Section 515: to provide a “direct, unambiguous ERISA cause of action to a plan against a delinquent employer.” Thus, the interpretation of Section 515 that is “most harmonious

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<sup>7</sup> Although the House approved the Senate's proposed Section 515, the House made other changes in the Senate bill which required resubmission of the bill to the Senate. During the course of the Senate's debates, Senator Williams explained the purposes of Section 515 in terms almost identical to those used by Representative Thompson and quoted in the text. See 126 Cong. Rec. 23288-89 (1980).

with . . . the general purposes that Congress manifested" is that Section 515 creates an ERISA duty on employers to comply with *all* their legal obligations with respect to the payment of agreed-upon contributions to multiemployer plans and that an employer who is delinquent with respect to *any* legally required contributions violates Section 515.

C. That Congress intended the scope of the Section 515 duty to encompass an employer's obligation to contribute under the NLRA is confirmed by the structure of ERISA and, more particularly, of the MPPAA amendments, of which Section 515 was a part.

In addition to the problems created by delinquent employers, Congress found that the stability of multiemployer plans was being threatened by the withdrawal of contributing employers.<sup>8</sup> See *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717 (1984). To address this concern, the MPPAA added to ERISA a new subtitle (Sections 4201-4303, 29 U.S.C. §§ 1381-1453) pursuant to which, *inter alia*, an employer which "permanently ceases to have an obligation to contribute under [a] plan" may be liable to the plan for withdrawal liability. ERISA §§ 4201, 4203, 29 U.S.C. §§ 1381, 1383.

Congress viewed the collection of delinquent contributions and the collection of employer withdrawal liability

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<sup>8</sup> Congress found that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations . . ." MPPAA § 3(a)(4)(A), 29 U.S.C. § 1001a(a)(4)(A). Like the collection of delinquent contributions, the collection of withdrawal liability from employers was considered by Congress to be "central to this legislation." 126 Cong. Rec. 20180 (1980) (colloquy between Sen. Williams and Sen. Matsunaga). See *id.* at 23039 (remarks of Rep. Thompson); 1980 Comm. Print 1. See generally H.R. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980).

as essentially the same issue for plans. *See* 126 Cong. Rec. 20180 (colloquy between Sen. Williams and Sen. Matsunaga). Indeed, this linkage is reflected in the statutory language. Section 4301(b) of ERISA, 29 U.S.C. § 1451(b), provides that “[i]n any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 515).” *See also* ERISA § 4221(d), 29 U.S.C. § 1401(d) (if an employer fails to make a timely withdrawal liability payment in accordance with an arbitrator’s decision, “the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515)”). The effect of these statutory cross-references is to make available the mandatory remedies of Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), to actions to collect withdrawal liability in addition to actions to collect delinquent contributions.

Given this statutory linkage, it is appropriate and instructive in gleaning the intended scope of the Section 515 duty to examine how Congress defined the obligation to contribute for withdrawal liability purposes. Section 4212(a) of ERISA, 29 U.S.C. § 1392(a), provides:

For purposes of this part, the term “obligation to contribute” means an obligation to contribute arising--

- (1) under one or more collective bargaining (or related) agreements, or
- (2) *as a result of a duty under applicable labor-management relations law, but*

*does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.* [Emphasis added.]

This definition demonstrates that Congress understood that an employer's obligation to contribute to a plan may be purely contractual ("under one or more collective bargaining . . . agreements"), but may also be imposed by the NLRA. The language of Section 515 accommodates these two sources of obligation to contribute by including obligations to make contributions "*under the terms of a collectively bargained agreement.*" (Emphasis added.)<sup>9</sup>

In view of the statutory design connecting Section 515 and the withdrawal liability provisions, it would be anomalous to read the former as limited to contractual obligations while the latter plainly includes NLRA-imposed obligations to contribute.<sup>10</sup> Indeed, if Section 515

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<sup>9</sup> In this regard, it is significant to note that the first half of the definition of the "obligation to contribute" for withdrawal liability purposes uses language that unmistakably refers only to contractual obligations, as that part of the definition is limited to obligations "arising under one or more collective bargaining agreements." In contrast, Section 515 does not apply only to an "employer who is obligated to make contributions . . . under collective bargaining agreements"; rather, Section 515, in terms, is applicable to employers who are "obligated to make contributions . . . *under the terms of a collectively bargained agreement.*" (Emphasis added.)

If Section 515 were interpreted to be limited to contractual obligations, the underscored phrase ("under the terms of") would be surplusage, which could have been eliminated for Section 515 just as it was in the definitional section of the withdrawal liability provisions as quoted in the text. Reading Section 515 to apply both to contractual obligations and also to legal obligations *which are defined and measured by the terms of a collective bargaining agreement* gives independent meaning to the phrase "under the terms of" in Section 515. See *Marek v. Chesny*, 473 U.S. 1, 9 (1985); authorities cited at n.12, *infra*. This is yet another reason for adopting the broader reading of Section 515.

<sup>10</sup> That Section 4212(a) begins with the phrase "[f]or purposes of this part" does not detract from the helpfulness of this provision in gleaning the Congressional design for Section 515, even though these sections lie in different parts of ERISA, as amended by the MPPAA. Read as a whole, Section 4212(a) excludes from the

were read narrowly to require compliance only with contractual duties, an employer could avoid paying withdrawal liability because of the existence of a *legal* duty to continue contributions, yet still not be under an ERISA duty to make those contributions. Such an interpretation of Section 515 would thus create a significant gap in this "comprehensive and reticulated" law (p. 11, *supra*)—a gap which would undermine the overriding purpose of the MPPAA: to protect the financial integrity of multiemployer plans. Accordingly, the far sounder construction is to read Section 515 to reach employers who are delinquent in contributions they are legally obligated to make (regardless of the source of the obligation) and to read Section 4201 to enable multiemployer plans to secure withdrawal liability from employers who permanently cease to be legally obligated to contribute.

D. There is one final consideration that militates in favor of the broader reading of Section 515. If that sec-

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definition of "obligation to contribute" an obligation to pay delinquent contributions. This exclusion is necessary to prevent employers from evading withdrawal liability by simply remaining delinquent in the payment of contributions and claiming that they remain obligated to contribute and have not withdrawn from the plan.

This exclusion of delinquent contributions from the "obligation to contribute" would make no sense in the context of Section 515, whose very purpose is to assure the collection of such contributions. It only makes sense in the withdrawal liability context; hence, the prefatory limiting phrase is included in Section 4212(a). As the Court noted in *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 370 n.14 (1980), with respect to a definition in Title I of ERISA which was limited by the introductory phrase "For purposes of this title," and which was not expressly incorporated by reference in another Title even though other Title I definitions occasionally were so incorporated: "[t]his specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force, though they may otherwise reflect the meaning of the terms defined as used in other Titles."

tion were read to apply only to obligations imposed by collective bargaining agreements, the section would be entirely duplicative of Section 301 of the LMRA, 29 U.S.C. § 185, which creates a federal cause of action for the breach of such contracts.<sup>11</sup> According to a settled rule of statutory construction, a statute is not to be read in a manner that renders the law meaningless.<sup>12</sup> To avoid such a result here, Section 515 must be understood to extend beyond contractual obligations, and to create a broader duty on employers to abide by any legal obligation to make agreed-upon contributions.<sup>13</sup>

For all these reasons, Section 515 is best read to impose on employers an ERISA duty to make legally-required, agreed-upon contributions, even if the legal obligation is not itself imposed by contract. It follows that, unless the NLRB's exclusive primary jurisdiction doctrine were applicable here, the Trust Funds stated a viable Section 515 claim by alleging that the Employer had failed to make contributions, on agreed-upon terms, at a time when the Employer was obligated by Section 8(a)(5) of the NLRA to continue to adhere to the terms

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<sup>11</sup> Prior to the enactment of ERISA in 1974, federal court jurisdiction of suits to collect delinquent contributions was predicated exclusively on Section 301 of the LMRA. See, e.g., *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960).

<sup>12</sup> See *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) ("the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 n.18 (1978); 2A Sutherland Stat. Const. § 46.06, at 104 (4th ed. 1984) (footnotes omitted) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .").

<sup>13</sup> Reading Section 515 in this fashion is also supported by the legislative history of the MPPAA in which Congress decided not merely to strengthen the then-existing remedies, but rather to create both an explicit statutory duty on employers to comply with their obligations to make contributions to multiemployer plans and mandatory remedies if they failed to do so. See pp. 15-20, *supra*.

of the expired collective bargaining agreements which provided for such contributions.<sup>14</sup>

## **II. The National Labor Relations Act Does Not Preempt A Claim Under Section 502 of ERISA Alleging A Breach of Section 515 of ERISA.**

The remaining question, of course, is whether the Trust Funds' claim falls within the exclusive primary jurisdiction of the NLRB and hence is preempted by the NLRA. As we proceed to show, several considerations compel a negative answer to that question.

A. Whether a claim or cause of action is preempted is, as this Court has repeatedly stressed, a matter of Congressional intent. See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). Although in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court formulated guidelines for determining when a claim falls within the NLRB's exclusive primary jurisdiction, those guidelines have "never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca v. Sipes*, 386 U.S. 171, 179 (1967).

In particular, in dealing with federal causes of action created by Congress, this Court has been reluctant to conclude that one federal statute—the NLRA—displaces other federal laws or limits the jurisdiction of the federal courts. Thus, for example, the Court has understood Section 301 of the LMRA to "authorize[] suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction"

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<sup>14</sup> We do not read the Ninth Circuit's decision in this case as necessarily inconsistent with our argument to this point. Although the court below found an absence "of useful statutory or congressional guidance on section 515" (Pet. App. A31), the court also stated that "admittedly the failure to pay may also violate section 515 of ERISA" (*id.* at A33). Thus, the Ninth Circuit at least left open the question of the scope of Section 515.

(*Farmer v. Carpenters*, 430 U.S. 290, 297 n.8 (1977); see *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962)), or even if adjudication of the Section 301 claim requires a determination of whether the agreement violates the NLRA (see *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982)), or whether the union violated the NLRA in its attempt to enforce the agreement (see *Vaca v. Sipes*, *supra*). Similarly, the Court has held that Section 303 of the LMRA, 29 U.S.C. § 187, "authorizes anyone injured in his business or property by activity violative of § 8(b)(4) of the NLRA, . . . 29 U.S.C. § 158(b)(4), to recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board." *Farmer v. Carpenters*, *supra*; see *Teamsters v. Morton*, 377 U.S. 252 (1964). And the Court has sustained the jurisdiction of the federal courts to adjudicate federal antitrust claims that arise out of conduct arguably prohibited by the NLRA. See *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). In sum, "where there is an independent federal remedy that is consistent with the NLRA," the Court generally has concluded that "the parties may have a choice of federal remedies." *Id.* at 635 n.17.

B. 1. In the instant case, there is no affirmative evidence to suggest that Congress intended to preempt Section 515 claims insofar as the claims raise issues under the NLRA or are based on NLRA-created obligations. To the contrary, as we have seen (pp. 15-20, *supra*), the very point of Section 515 was to address the problem of delinquent contributions in its entirety by creating, under ERISA, a unitary cause of action to enable multiemployer plans to collect delinquent contributions. That purpose would be gravely disserved if trust funds were required to rely solely on the processes of the NLRB to collect delinquent contributions from employers who were obligated, under Section 8(a)(5) of the NLRA, to continue

to adhere to the terms of an expired collective bargaining agreement.<sup>15</sup>

Proceedings before the NLRB are “not to adjudicate private rights but to effectuate” national labor policy. *NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 424 (1968). See *International Union, United Automobile, Aircraft and Agricultural Implement Workers v. Russell*, 356 U.S. 634, 643 (1958). As the Court explained in *Shepard v. NLRB*, 459 U.S. 344, 351-52 (1983) :

This Court has said that the Board’s “power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.” *Automobile Workers v. Russell*, 356 U.S. 634, 642-643 (1958).

We find nothing in the language or structure of the [NLRA] that requires the Board to reflexively

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<sup>15</sup> If Section 515 claims based on NLRA-created obligations are preempted, then multiemployer plans will have to file both a federal court action for any pre-contract expiration delinquencies and a separate unfair labor practice charge with the NLRB for post-contract expiration, pre-impasse delinquencies against the same employer covering consecutive periods of time. Preemption of such Section 515 claims would resurrect the very problem that Congress, by enactment of Section 515, sought to eliminate—the “insufficient and unnecessarily cumbersome and costly” “recourse available under current law for collecting delinquent contributions.” P. 18, *supra*. Prior to Section 515’s enactment, the then-available recourse included both federal court actions under Section 301 of the LMRA, 29 U.S.C. § 185, based on a contract and NLRB enforcement proceedings. Consequently, it simply makes no sense to conclude that Congress, after having criticized the then-available remedies, intended to require trustees of multiemployer plans to resort to the NLRB for enforcement of post-contract expiration contribution obligations. Rather, Congress presumably expected that Section 515 would also encompass these obligations.

order that which a complaining party may regard as "complete relief" for every unfair labor practice.

Thus, the NLRA enforcement scheme is designed to facilitate the resolution of labor disputes, not the collection of delinquent contributions.

The NLRB operates under a number of jurisdictional and procedural limitations in unfair labor practice proceedings which would severely undermine the efforts of trust funds to collect delinquent contributions.

*First*, the NLRB may decline to exercise its jurisdiction where, in the opinion of the NLRB, the effect of the labor dispute on commerce "is not sufficiently substantial to warrant the exercise of its jurisdiction. . ." Section 14(c)(1) of the NLRA, 29 U.S.C. § 164(c)(1).<sup>16</sup>

*Second*, the NLRB will not remedy any conduct occurring more than six months prior to the filing of the unfair labor practice charge with the NLRB. See Section 10(b) of the NLRA, 29 U.S.C. § 160(b). By contrast, a federal court action under ERISA to collect delinquent contributions is governed by the most applicable statute of limitations of the forum state since ERISA does not specify one.<sup>17</sup> In California, the statute of limitations for actions for breach of a statutory duty is three years. Cal. Civ. Proc. Code § 338 (Deering 1987). Trust funds rely

<sup>16</sup> For example, the NLRB declines to exercise jurisdiction over non-retail enterprises where the total gross inflow or outflow of goods or services across state lines is less than \$50,000 per annum. See *Siemons Mailing Service*, 122 N.L.R.B. 81 (1958); *Culligan Soft Water Service*, 149 N.L.R.B. 2 (1964).

<sup>17</sup> See, e.g., *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir.), cert. denied, 464 U.S. 829 (1983); *Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 779 F.2d 1098, 1104-07 (6th Cir. 1986); *Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). See also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

on the self-reporting of employers or on audits of the employer's payroll and personnel records to determine whether contributions are due. *Central Transport*, 472 U.S. at 562-63. A six-month limitation, while arguably appropriate where the union or employer has or should have first-hand knowledge of the actions constituting an unfair labor practice, would be a profound restriction on trust funds, which ordinarily do not have an ongoing, day-to-day working relationship with the employer.<sup>18</sup>

Third, the investigation of charges, and the issuance and prosecution of unfair labor practice complaints are entirely within the control and discretion of the General Counsel of the NLRB. See 29 U.S.C. § 153(d); 29 C.F.R. §§ 101.2, 101.4. The trustees would have no control over the decision to issue the complaint, or the discovery and other litigation decisions involved.<sup>19</sup> They would, in short, be at the mercy of the General Counsel who, unlike the trustees, has no fiduciary duties under ERISA and whose discretion in exercising its jurisdiction over unfair labor

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<sup>18</sup> Any notion that trustees can rely on unions to enforce an employer's obligations to an employee benefit plan did not survive the Court's decision in *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364 (1984), and *Central Transport*, where the Court concluded:

[C]ompelling benefit plans to rely on unions would erode the protections ERISA assures to beneficiaries, for the diminishment of trustee responsibility that would result would not necessarily be made up for by the union. ERISA places strict duties on trustees with respect to the interests of beneficiaries, and unions' duties toward beneficiaries are of a quite different scope.

*Central Transport*, 472 U.S. at 575-76.

<sup>19</sup> The NLRB does not allow charging parties or interested third parties to obtain the pretrial discovery accorded parties to judicial proceedings under the Federal Rules of Civil Procedure. See, e.g., II The Developing Labor Law 1625 (C. Morris ed. 1983); NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings § 10292.4.

practices is subject to very few limitations.<sup>20</sup> NLRB Chairman Dotson has referred to the NLRB's "heavy workload" and criticized the use of unfair labor practice proceedings to collect delinquent fringe benefit contributions. *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. No. 126 (1986) (Dotson, dissenting). In *CCA Heating & Air Conditioning, Inc.*, 279 N.L.R.B. No. 54 (1986) (Dotson, dissenting), Chairman Dotson emphasized that the NLRB "has a high backlog of undecided cases . . . over 1200 cases are awaiting decision" and that the NLRB "is not a collection agency for the recoupment of delinquent contributions."<sup>21</sup>

*Fourth*, even when the General Counsel of the NLRB decides to prosecute, case processing delays and the continuing case backlog at the NLRB will prevent trust funds from securing prompt payment of delinquent con-

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<sup>20</sup> As the Court explained in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975) :

Congress has delegated to the Office of General Counsel "on behalf of the Board" the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. § 153(d); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). . . . In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

*See, e.g., Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint").

<sup>21</sup> Some courts have ruled that trustees do not even have standing to invoke the jurisdiction of the NLRB. For example, in *Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1183 (11th Cir. 1985), the Eleventh Circuit concluded that neither the board of trustees of an employee benefit plan nor the individual trustees had standing to bring an unfair labor practice charge against the employer.

tributions. See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1795 (1983) (delay of "nearly 1000 days as of 1980" from the filing of an unfair labor practice charge to the receipt of an enforceable order). These delays are so serious that a recent report of a House Committee found that the NLRB "is in a crisis. Delays in decision-making at the Board level and a staggering and debilitating case backlog have resulted in workers being forced to wait years before cases . . . are decided." House Comm. On Government Operations, Delay, Slowness in Decisionmaking, And The Case Backlog At The National Labor Relations Board—Fifty-Ninth Report, H.R. Rep. No. 1141, 98th Cong., 2d Sess. 4 (1984). The time-consuming procedures of the NLRB are not a recent development, even if their magnitude has increased. During the period 1978-1980, when Congress was considering the MPPAA and its precursors, Congress was well aware of such delays.<sup>22</sup> In addition, even when the NLRB decides in the trust funds' favor, the NLRB has no inherent authority to enforce its order and therefore must seek enforcement in a United States court of appeals. See Section 10(e) of the NLRA, 29 U.S.C. § 160(e); II The Developing Labor Law 1695 (C. Morris ed. 1983). Moreover, Section 10(e) does not specify a time limitation for the filing of a petition for enforcement of the NLRB's order. Thus, except for the possible defense of laches, the NLRB may sit on a case for an extended period of time before seeking enforcement in the courts. This procedure, built into the NLRA itself, further delays and frustrates the overall Congressional objective of prompt payment of trust fund obligations.

*Fifth*, even should the trust funds prevail in an unfair labor practice proceeding before the NLRB, they will not

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<sup>22</sup> See *Labor Reform Act of 1977 (Part I): Hearings on H.R. 8410 before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977).

receive the reasonable attorney's fees, costs, interest on the unpaid contributions, and an additional amount equal to the greater of interest or specified liquidated damages (the so-called mandatory double interest provisions) that Congress, in enacting the MPPAA, mandated that trust funds receive when they prevail on a claim for delinquent contributions. See p. 12, *supra*.<sup>23</sup> The NLRB cannot impose any type of punitive sanction. "The regulatory scheme established for labor relations by Congress is 'essentially remedial,' and the [NLRB] is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940)." *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. \_\_\_, 89 L.Ed.2d 223, 229 n.5 (1986). See *Russell*, 356 U.S. at 646 (power to impose punitive sanctions is not within the jurisdiction of the NLRB); *NLRB v. Strong*, 393 U.S. 357, 358 (1969) (NLRB is not authorized to take punitive measures). By contrast, the mandatory double interest provisions which the MPPAA added to ERISA, 29 U.S.C. § 1132(g)(2)(B) and (C), "fulfill most of the usual functions of punitive damages in deterring misconduct and ensuring compliance." *Winterrowd v. David Freedman and Company, Inc.*, 724 F.2d 823, 827 (9th Cir. 1984). In addition, unlike the NLRB, a federal court may, in certain circumstances, award punitive damages in actions to recover

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<sup>23</sup> The NLRB has refused to award interest where an employer failed to pay fringe benefit contributions and where the plans provided for liquidated damages in the event of nonpayment of fringe benefit contributions; the NLRB concluded that there existed a privately agreed-upon substitute for the award of interest on unpaid contributions. See, e.g., *David Ashcraft Company, Inc.*, 279 N.L.R.B. No. 94 (1986); *Scheuner Construction Company*, 266 N.L.R.B. 624, 625 n.4 (1983), *enforce<sub>a</sub> nem.*, 720 F.2d 679 (6th Cir. 1983). These decisions clearly contravene Section 502(g)(2) of ERISA which requires the award of interest in addition to liquidated damages.

unpaid employer contributions under Section 515 of ERISA. *Id.* at 826-27.

Finally, unilateral settlements in unfair labor practice cases may be entered into by the NLRB and the charged party despite objections by the charging party. See 29 C.F.R. § 101.9(c). Such NLRB negotiated settlements may compromise contribution obligations in exchange for employer concessions in other areas. See, e.g., *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F. Supp. 1441, 1444 (W.D. Mo. 1985) (NLRB settlement, despite objections of the charging party, in an amount equal to 80% of the contributions that should have been paid).<sup>24</sup>

The foregoing makes clear that the NLRB is *not* an adequate avenue of redress for trust funds with respect to the collection of delinquent contributions. In situations where the NLRB, for whatever reason (including reasons unrelated to the merits of the claim), refuses to prosecute, multiemployer employee benefit plans will have *no available forum* in which to collect post-contract expiration contribution delinquencies under the Ninth Circuit's reading of Section 515.<sup>25</sup> And, even where the NLRB decides to prosecute, trust funds may very well *not* receive a settlement or NLRB order in an amount equal to 100% of the contributions that should have been paid. In that event, the trustees' interest in fully collecting all

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<sup>24</sup> According to the NLRB's own data, of the unfair labor practice cases which the NLRB regional offices found to have merit in fiscal year 1983, 85% of these cases were disposed of by formal or informal settlements by the regional offices. See Forty-Eighth Annual Report of the NLRB for the Fiscal Year Ended September 30, 1983, Chart No. 3A at 7 (1986).

<sup>25</sup> Cf. *Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967) ("The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine").

contributions owed to a multiemployer plan would be compromised.<sup>26</sup> Cf. *NLRB v. Amax Coal Company*, 453 U.S. 322, 337 (1981) ("trustees have an obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund' ") (emphasis in original; citation omitted). Yet the trust funds will still remain liable for pension benefits for hours worked by employees for which no contributions were made.<sup>27</sup>

2. Granting exclusive jurisdiction to the NLRB to enforce the contribution obligations of employers whose collective bargaining agreements have expired would disserve the policies of ERISA in a second way: such a rule would undermine the responsibility of the trustees of a multiemployer plan to assure full and prompt collection of contributions owed to a plan. See *Central Transport*, 472 U.S. at 573, 580. As this Court has

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<sup>26</sup> The legislative history of the MPPAA indicates that such compromises, which are the foundation of effective labor-management relations, are to be avoided with respect to multiemployer plans because they place the financial burden on the other employers participating in the plan. See 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson).

<sup>27</sup> See *Central Transport*, 472 U.S. at 567 n.7, 579 n.20 ("the Labor Department has consistently taken the position that any pension plan document language denying benefits to a participant because of an employer's failure to make required contributions would violate ERISA and would thus be unenforceable . . . At a minimum, this means that [a trust fund] is reasonable in operating . . . under the assumption that it would be liable for pension claims regardless of an employer's failure to make required contributions"); 29 C.F.R. § 2530.200b-2; Department of Labor Advisory Op. No. 78-28A (Dec. 5, 1978); Department of Labor Advisory Op. No. 76-89 (Aug. 31, 1979). Trust funds will also remain liable for other fringe benefits when the applicable trust documents provide for benefits for hours worked by employees regardless of an employer's failure to make the required contributions.

stated, "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Id.* at 571. Indeed, "[t]he Secretary of Labor has explicitly interpreted the trustees' duty to prevent employer use of trust assets as . . . requiring plans to adopt systems for policing employers" as it is the Department's view that "'failing to collect delinquent contributions'" may constitute a "prohibit[ed] extension[] of credit to employers." *Id.* at 573-74. And "the structure of ERISA makes clear that Congress did not intend for government enforcement powers to lessen the responsibilities of plan fiduciaries." *Id.* at 578.

Given the emphasis that ERISA places on the *trustees'* duty to collect delinquent contributions, it would be surprising, indeed, if Congress intended to leave the trustees at the mercy of the General Counsel of the NLRB in collecting contributions from delinquent employers whose obligation to contribute arises, in part, from the NLRA. The far more likely conclusion is that in enacting Section 515 Congress intended to enable the trustees to pursue *all* categories of delinquent employers.

C. Aside from the evidence that the policies underlying Section 515, and ERISA generally, would be diserved if any category of Section 515 claims were relegated to the exclusive jurisdiction of the NLRB, there are two more specific indications in the statutory materials that Congress did not intend to preempt Section 515 claims brought to enforce NLRA-based obligations.

1. At the same time that Congress enacted Section 515, it enacted another statutory obligation whose enforcement, in terms, requires courts to adjudicate the precise NLRA issues that are implicated by the Trust Funds' claim in the instant case. We refer to the MPPAA provisions establishing withdrawal liability, which provisions, as we previously noted, impose such

liability only on an employer whose "obligation to contribute" to a plan either "under one or more collective bargaining agreements, or as a result of a duty under applicable labor-management relations law" has ceased. ERISA § 4212(a), 29 U.S.C. § 1392(a). See p. 21, *supra*.

Under these sections, in order to determine whether an employer has "withdrawn" and thus owes "withdrawal liability," it is necessary to decide whether the employer continues to have a contribution obligation "under applicable labor-management relations law." The arbitrator or court must decide the very NLRA issue posed here: whether the employer had reached the point of impasse in bargaining for a successor contract—in which case the employer no longer is obligated to abide by the terms of the expired contract and may be subject to withdrawal liability—or whether bargaining has not yet become "fruitless" (*NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 533 (1984)), in which case the terms of the contract must still be honored and no withdrawal liability can be imposed. See F. ISA §§ 4221, 4301, 29 U.S.C. §§ 1401, 1451; 1980 Comm. Print 12-14; H.R. Rep. No. 869 (Part II), 96th Cong., 2d Sess. 16 (1980); *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 695 (9th Cir. 1986) (remanding for ruling on whether or not an "impasse" in negotiations had been reached either before or after the effective date of the MPPAA withdrawal liability provisions); *I.A.M. National Pension Fund v. Schulze Tool and Die Co., Inc.*, 564 F. Supp. 1285, 1294 n.4 (N.D. Cal. 1983) (court must resolve "impasse" issue in making withdrawal liability determination).<sup>28</sup>

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<sup>28</sup> This "intricate relationship" between withdrawal liability and post-contract expiration contribution obligations is an "intensely practical consideration[] which foreclose[s] pre-emption of judicial cognizance of" post-contract expiration contribution collection actions under Section 615. *Vaca*, 386 U.S. at 183 ("There are some

The fact that Congress authorized the courts to adjudicate this issue in the withdrawal liability context provides persuasive evidence that Congress did not view such adjudication as unduly trenching upon the policies of the NLRA or the prerogatives of the NLRB. And it makes no sense to conclude that Congress desired to preempt actions to enforce Section 515 obligations where such actions raise NLRA questions when Congress authorized the courts to decide these very NLRA issues in the withdrawal liability context.

The instant case illustrates the point well. When Advanced Lightweight withdrew from the multiemployer bargaining association (the AGC) and ceased making contributions to all of the Trust Funds created by the collective bargaining agreements and the trust agreements between the AGC and the Unions, the Trust Funds had two options: they could have sued for withdrawal liability (on the theory that Advanced Lightweight had permanently ceased to have an obligation to contribute to the Trust Funds) or they could have sued for delinquent contributions. Had the Trust Funds brought the former suit, the courts would have been *required* to examine the course of bargaining between Advanced Lightweight and the Unions in order to determine whether the parties were at a permanent impasse so as to permanently relieve Advanced Lightweight of its obligation to make contributions to the Trust Funds and thereby trigger withdrawal liability. Given that fact, there is no sound reason to believe that Congress intended to foreclose the very same inquiry in a Section 515 suit merely

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intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA § 301 charging an employer with a breach of contract").

because the Trust Funds reached the judgment that Advanced Lightweight was still under an obligation to contribute and sued to collect such contributions.

2. There is a second piece of evidence in the MPPAA that leads to the conclusion that Congress did not intend to give the NLRB exclusive authority to press and resolve claims for delinquent contributions from an employer whose agreement has expired. As this Court recently noted, "neither the structure of [ERISA] nor the legislative history shows any congressional intent that plans should rely primarily on centralized federal monitoring of employer contribution requirements. Indeed, [in enacting the MPPAA,] Congress expressly withheld from the Secretary [of Labor] the authority to initiate actions to enforce an employer's contribution obligations." *Central Transport*, 472 U.S. at 578 (citing ERISA § 502(b)(2), 29 U.S.C. § 1132(b)(2) (as added by MPPAA § 306(b)(1))). Congress did so because it concluded that "the Labor Department should not be subjected to pressures which might cause it to routinely institute collection litigation on behalf of plans against delinquent employers." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess., S. 209, The ERISA Improvements Act of 1979: Summary and Analysis of Consideration 46 (Comm. Print 1979).<sup>29</sup>

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<sup>29</sup> As discussed at n.5, *supra*, Senators Williams and Javits introduced S. 209 at the start of the Congress that eventually enacted the MPPAA. S. 209 included a provision (Section 153) prohibiting the Secretary of Labor from initiating suits under a section virtually identical to Section 515 of ERISA. See *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 36, 42 (1979). There appears to be no explanation of Section 502(b)(2) of ERISA in the legislative history of the MPPAA. Since S. 209 and the MPPAA were introduced in the same Congress and S. 209 contains language virtually identical to Sections 502(b)(2) and 515, the explanation of the S. 209 precursor to Section 502(b)(2) should provide insight concerning Congressional intent with respect to the latter.

If the Trust Funds' claim were held to be preempted here, the General Counsel of the NLRB would have not merely the power but the *exclusive authority* to collect delinquent contributions from employers whose agreements have expired. See p. 29, *supra*. The General Counsel would thus be subject to the very "pressures . . . to . . . institute collection litigation" from which Congress sought to insulate the Secretary of Labor. There is every reason to assume that Congress would not have intended such a result and thus would not have intended to deny multiemployer plans the power to pursue contributions from delinquent employers whose agreements have expired but whose obligation to contribute continues.

D. In reaching its contrary conclusion, the court below dismissed the legislative materials pertaining to the enactment of Section 515 on the ground that there is no "indication that Congress was aware of the potential for conflict between § 515 and §§ 7 and 8 of the NLRA." Pet. App. A27 n.12. The court reasoned that "[t]he lack of useful statutory or Congressional guidance on section 515 requires that the matter be decided by the application of accepted labor law principles." *Id.* at A31. And applying the *Garmon* guidelines mechanically, the court easily concluded that the Trust Funds' claim was preempted. The court's analysis is doubly flawed.

First, as we have seen (pp. 25-26, *supra*), the *Garmon* guidelines are not to be "rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." P. 25, *supra*. This is especially true where *Garmon* is invoked to preempt an independent *federal* remedy. Thus, the relevant question here is not whether there is "persuasive evidence . . . that Congress intended section 515 to be an exception to the general rule of NLRB preemption" (Pet. App. A36-A37), but rather whether it can "fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB."

Second, as we also have seen, no matter how the question is framed, the statutory structure and policies compel the conclusion that Congress could not have intended to preempt suits to enforce Section 515 against delinquent employers whose obligation to continue contributing on agreed-upon terms is derived from the NLRA. Preempting such suits would undermine the principal purpose of Section 515, and of the MPPAA generally: protecting the financial integrity of multiemployer plans. Preemption would compromise the trustees' role as collector of contributions, and would place a governmental officer in the position of collection agent. Yet preemption would not advance any NLRA policy, since the very NLRA issues that would be removed from judicial consideration by the preemption of Section 515 claims would nonetheless end up in federal court in claims for withdrawal liability.

### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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